PACIFIC LEGAL FOUNDATION

December 31, 2013

California Coastal Commission
c/o Sea-level Rise Work Group
45 Fremont Street, Suite 2000
San Francisco, CA 94105

Re: Comments on *Draft Sea-Level Rise Policy Guidance*

Dear Sir or Madam:

Pacific Legal Foundation submits these comments on the California Coastal Commission's *Draft Sea-Level Rise Policy Guidance*. PLF is the nation's oldest public interest legal foundation that advocates in courts across the country for the protection of private property rights, individual liberties, and balanced environmental regulation. Over its four-decade history, PLF has represented many coastal landowners in disputes with the Commission, most prominently in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

PLF understands that the *Draft Guidance* is not intended to be legally binding, and that the document disclaims any analysis of the property rights implications, under the United States and California Constitutions, of regulation motivated by sea-level rise. *Draft Guidance* at 20-21. Nevertheless, the *Draft Guidance* appears to proceed based on significant misunderstandings of the California Coastal Act, as well as the state and federal Constitutions. Accordingly, correcting these deficiencies now will help ensure that the Commission and local governments conform their actions to the law.

A principal presupposition of the *Draft Guidance* is that California coastal landowners do not have the right to protect their private property from natural forces, such as sea-level rise. For example, the document recommends that "[n]ew structures in hazard areas should include provisions to ensure structures are modified, relocated, or removed when they become threatened by natural hazards, including sea-level rise, in the future." *Draft Guidance* at 24. The document goes on to recommend that local coastal programs should "require new development to be safe . . . without the use of any shoreline protective device," and that permits to build should be conditioned on the "waiver of rights to future shoreline protection." *Id.* at 51. *See also id.* at 54. Finally, the *Draft Guidance* counsels

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local governments generally to prohibit bluff retention and other shoreline protection for new development. *Id.* at 54. These recommendations are based on erroneous interpretations of the Coastal Act, as well as the state and federal Constitutions.

The Coastal Act

Contrary to the *Draft Guidance*'s implied position, the Coastal Act does *not* generally forbid the construction of sea walls and other protective devices. Although Section 30253 of the Public Resources Code precludes the approval of new development that "in any way require[s] the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs," the statute does not impose a blanket prohibition.

First, the prohibition does not extend to protective devices that require only an insubstantial alteration of natural landforms. It may be that, given current technology, many protective devices unavoidably produce substantial alteration; but it is by no means certain such technology will remain static over the next century (within the *Draft Guidance*'s own planning horizon). It is therefore unreasonable to require a property owner to waive the right ever to build a protective device when the Commission has absolutely no idea whether the protective device "of the future" will necessarily cause a substantial landform alteration, which, after all, is the *only* type of protective device the Coastal Act generally proscribes.

Second, the prohibition extends only to devices designed to protect "new" development, not existing development. But under the *Draft Guidance*, protective devices are made taboo absolutely, even if necessary to protect existing structures requiring substantial repair. *See Draft Guidance* at 54 ("[P]ermits for shoreline protective devices should be limited to the life of the existing development the protection device is designed to protect."). A recent decision from the Superior Court of San Diego confirms that this interpretation of the Coastal Act is infirm. *Lynch v. Cal. Coastal Comm'n*, Judgment Granting Peremptory Writ of Mandate, Case No. 37-2011-00058666-CU-WM-NC (S.D. Cty. Sup. Ct. Apr. 24, 2013).[1]

Third, the prohibition only extends to "new" development that *requires* a protective device. The statute thus preserves an important distinction between (i) the construction of a building that may, in the indeterminate future, require protection, and (ii) the construction of a building that immediately requires protection to be safe and habitable. The Coastal Act prohibition only applies

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[1] The Commission staff report for the Solana Beach Land Use Plan Amendment recommends removal of the 20-year limitation for permitting protective devices. *See* Staff Recommendation on City of Solana Beach Major Amendment SOL-MAJ-1-13 for Commission Meeting of January 9, 2013, at 5 (Dec. 20, 2013), *available at* http://documents.coastal.ca.gov/reports/2014/1/Th7d-1-2014.pdf (last visited Dec. 31, 2013).

to the latter class of developments; the prohibition does not apply to development that someday may require such a device. To interpret the statute otherwise would mean that protective devices would be generally prohibited, as presumably at some point in the geological future every structure within the coastal zone may require protection. But such a result would be inconsistent with the statute.

The California Constitution

Article I, section 1, of the California Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, *and protecting property*, and pursuing and obtaining safety, happiness, and privacy" (emphasis added). As the italicized language makes clear, California property owners, including coastal landowners, have the inalienable right to protect their own property. *Cf. Kentucky Fried Chicken of Cal., Inc. v. Superior Court*, 14 Cal. 4th 814, 829 (1997) (noting that Article I, section 1, "recognize[s] the right of any person to defend property with reasonable force").

Unfortunately, the *Draft Guidance* improperly presupposes that sea-level rise, coupled with the Coastal Act, effectively erases this right. The California Supreme Court, however, has made clear that legislation cannot impair this "foundation of every constitutional government, . . . necessary to the existence of civil liberty and free institutions, [and] one of the primary objects of government." *Billings v. Hall*, 7 Cal. 1, 6 (1857). To be sure, the right is subject to reasonable regulation, and a landowner may protect his coastal property only in a manner that avoids harm to other property owners and the public. Nevertheless, the core right remains and cannot be categorically forfeited as the *Draft Guidance* presumes.

The United States Constitution

Under the unconstitutional conditions doctrine, property owners cannot be coerced, through the land-use permitting process, to give up the right to be free from an uncompensated taking of their property. *See Koontz v. St. Johns River Water Management Dist.*, 133 S. Ct. 2586, 2596 (2013); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546-47 (2005). Any condition imposed on the right to develop must bear an essential nexus to the effects of the proposed development. *See Nollan*, 483 U.S. at 837. Unfortunately, the *Draft Guidance* is oblivious to this critical constitutional limitation on the Commission's and local governments' permitting authority. For example, as noted above, the *Draft Guidance* recommends that property owners be required, as a condition to development, to waive any right they may have to build a protective device in the future, should one become necessary. *See Draft Guidance* at 51. Such a recommendation, if implemented, would fail to meet the essential nexus standard. No connection, much less an essential connection, exists between the development of property and the waiver of the right to protect that property in the future. The only threatened harm that arises from such development is, ironically enough, caused by the waiver itself; for if the property could be protected, then it would not pose a nuisance to any public or private right.

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PLF understands that rising sea levels will threaten a variety of public and private interests along California's shore. PLF therefore appreciates the Commission's and its staff's decision to address these scientific and technical issues now. Nevertheless, simply because Mother Nature may pose challenges to human health and welfare is no basis to ignore the statutory and constitutional limitations on the Commission's and local governments' land-use authority. PLF therefore urges the Commission to revise the *Draft Guidance* so that both the public interest *and* individual liberty be adequately protected.

Yours sincerely,

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